STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 25, 2013
v	No. 310331 Wayne Circuit Court
ROBERT DARYL THREAT, Defendant-Appellant.	LC No. 11-012587-01-FH

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant Robert Daryl Threat appeals by right his bench conviction of second-degree criminal sexual conduct. MCL 750.520c(1)(a). The trial court sentenced him as a habitual offender, MCL 769.12, to serve nine to 20 years in prison. Because we conclude that there were no errors warranting a new trial, we affirm. However, we agree that the presentence report contains an error that must be corrected; accordingly, we remand this case to the trial court to correct the report.

After his conviction, Threat moved for a new trial on the ground that the child witness, who was six years old when the offense occurred and seven at trial, had been coached and there was no other evidence that anything happened to her. In addition, he argued new facts not part of the trial record—that health conditions rendered him incapable of performing sexual acts and that he was entitled to post-conviction DNA testing. The trial court denied the motion, stating that it found the child's testimony to be credible despite evidence that she was coached with respect to the words that she should use to describe the events. The trial court also noted that there was evidence that Threat tried to encourage the child's mother to refuse to testify. In addition, the court determined that Threat's allegations about his physical condition were not newly discovered and that the request for DNA evidence was not relevant because the case did not involve penetration.

Threat argues that the trial court abused its discretion when it denied his motion for new trial because the verdict was against the great weight of the evidence. This Court reviews for an abuse of discretion a trial court's decision on a motion for new trial. *People v Grissom*, 492 Mich 296, 312; 821 NW2d 50 (2012). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict

that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

The trial court found that Threat engaged in sexual contact with the child witness in contravention of MCL 750.520c(1)(a). Sexual contact means "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification . . . ." MCL 750.520a(q). At trial, the child witness testified about the events at issue and, if believed, her testimony was sufficient by itself to establish the elements of the offense. See MCL 750.520h; *People v Brantley*, 296 Mich App 546, 551; 823 NW2d 290 (2012).

On appeal, Threat contends that the trial court should not have believed the child witness because there was evidence that she was coached. We do not agree that this evidence rendered the child's testimony patently incredible. See *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998). The child testified that Threat pulled down her pajama pants and put his penis on her private part and that, when her mother came into the room, she pulled up her pants while Threat ran to the bathroom. Moreover, the trial court heard a recording of a telephone call between Threat and the child's mother in which Threat encouraged her not to bring the child to court. This evidence permits an inference that Threat was conscious of his guilt. See *People v Falkner*, 36 Mich App 101, 108; 193 NW2d 178 (1971) ("Evidence of attempts by the accused to induce witnesses not to testify may properly be considered by the fact finders."), rev'd on other grounds 389 Mich 682 (1973), but cited with approval in *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). On this record, we are not at liberty to second guess the trial court's credibility determination. *Lemmon*, 456 Mich at 645-646. For that reason, we cannot conclude that the verdict was against the great weight of the evidence.

The trial court did not abuse its discretion when it denied Threat's motion for a new trial.

Next, Threat argues that the trial court's order compelling him to pay his attorney's fees will cause manifest hardship to him and his family. He contends that the trial court should conduct an ability to pay analysis. The ability to pay analysis is only necessary when the order is enforced and the defendant contests his ability to pay. *People v Jackson*, 483 Mich 271, 290-292; 769 NW2d 630 (2009). If Threat believes that his unique financial circumstances rebut the statutory presumption of nonindigency, he may petition the court to reduce or eliminate the amount. *Id*. at 296.

Here, there is no evidence that Threat petitioned the trial court to reduce or eliminate the amount that he was required to pay at the time of enforcement. Moreover, he has not provided this Court with any evidence that the order to pay $400 amounted to a manifest hardship. Therefore, he has not established that the trial court plainly erred. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

Finally, Threat argues that there is an error in the guidelines range stated in his presentence report and a corrected report should be sent to the Department of Corrections. At sentencing, the trial court stated that it calculated the guidelines range "at a level F-2 which is 36 to 142 months," and both lawyers agreed. In particular the court noted that offense variable (OV) 11 should be scored a zero points. The prosecution agrees on appeal that Threat's sentencing report erroneously shows a guidelines range of 58 to 228 months and an OV 11 score of 50. We agree that Threat is entitled to have these errors corrected. Accordingly, we remand this matter to the trial court for the ministerial task of correcting the errors in the report and forwarding a corrected copy to the Department.

Affirmed, but remanded for correction of Threat's sentencing information report. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Michael J. Kelly